

October 10, 2003

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>WILLIAM BIRKNER</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 237,891
<b>S &amp; S EQUIPMENT COMPANY, INC.</b>	)	
Respondent	)	
AND	)	
	)	
<b>MARYLAND CASUALTY COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appeals from the February 12, 2001 Award of Post-Award Medical entered by Administrative Law Judge Jon L. Frobish.

**ISSUES**

Claimant suffered severe traumatic injuries to his left hand on February 7, 1997, while working for respondent. A compromise settlement was approved by Special Administrative Law Judge James R. Roth on October 7, 1999. That award left open future medical. Thereafter, claimant sought a follow-up examination with Dr. George L. Lucas, which respondent authorized. His office notes from that examination, dated September 14, 2000, are attached as Claimant's Exhibit 1 to the transcript of the January 16, 2001 hearing for Post-Award Medical.

Neither party filed a brief with the Board and, therefore, the Board does not have the benefit of their arguments. But at the hearing claimant announced that he was seeking additional medical treatment for his left hand and forearm.<sup>1</sup> What is disputed is whether the carpal tunnel syndrome (CTS) that has now been diagnosed in claimant's left upper extremity is directly traceable to the February 7, 1997 accident. Judge Frobish denied claimant an award of post-award medical benefits by his order of February 12, 2001. Respondent contends that claimant's left upper extremity condition and need for medical treatment is not related to the original injury, but instead is a new and subsequent repetitive use injury which should be filed as a separate claim. Claimant counters that his current condition and need for medical treatment is a direct result of the February 7, 1997 accident, and denies any subsequent accident or intervening injury. Therefore, the issue is whether

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<sup>1</sup> See Claimant's Form K-WC E-4 Application for Post Award Medical, filed September 13, 2000.

claimant's current need for medical treatment for the left upper extremity CTS condition is due to the accidental injury that arose out of and in the course of claimant's employment with respondent.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Claimant has continued to work for respondent. He has had numbness and severe pain in his left hand ever since the original injury but these symptoms have increased and grown worse. When he returned to see Dr. Lucas on September 13, 2000, he was diagnosed with CTS on the left. Dr. Lucas' records, however, are silent as to the cause of claimant's CTS condition. Claimant had previously been treated for CTS on the right and underwent a median nerve decompression surgery performed by Dr. Cullen on November 4, 1998. This right CTS injury was the subject of a separate workers compensation claim.

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.<sup>2</sup> "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."<sup>3</sup> The Act is to be liberally construed to bring employers and employees within the provisions of the Act but those provisions are to be applied impartially to both.<sup>4</sup>

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.<sup>5</sup> It is not compensable, however, where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause.<sup>6</sup> Claimant must prove by substantial competent evidence that his current injury is a direct and natural consequence of his original injury and did not occur as a result of a new accident at work. The term "substantial evidence" when applied to workers' compensation proceedings refers to evidence possessing of substance

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<sup>2</sup> K.S.A. 44-501(a); *see also* Chandler v. Central Oil Corp., 253 Kan. 50, 853 P.2d 649 (1993) and Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

<sup>3</sup> K.S.A. 44-508(g). *See also* In re Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>4</sup> K.S.A. 44-501(g).

<sup>5</sup> Jackson v. Stevens Well Service, 208 Kan. 637, 493 P.2d 264 (1972).

<sup>6</sup> Nance v. Harvey County, 263 Kan. 542, 952 P.2d 411 (1997); Stockman v. Goodyear Tire & Rubber Co., 211 Kan. 260, 505 P.2d 697 (1973). *See also* Bradford v. Boeing Military Airplanes, 22 Kan. App. 2d 868, 924 P.2d 1263, *rev. denied* 261 Kan. 1082 (1996).

and capable of inducing conviction, or furnishing substantial basis of fact from which an issue can be reasonably resolved.<sup>7</sup> "Causal relation is a necessary element in establishing liability under a workers' compensation claim, and it cannot be presumed but must be proven by a preponderance of evidence."<sup>8</sup>

The only medical evidence concerning claimant's current left CTS condition is that of Dr. Lucas, which is silent as to the cause of this condition. The Board finds claimant has failed to prove that the original work related injury is the most likely cause of the left CTS condition. Based upon the record presented, the Board cannot determine whether claimant's left upper extremity problem is the result of the original trauma or is instead a result of his subsequent activities, or both. Accordingly, the Board finds that claimant's current left upper extremity complaints are not compensable as a direct and natural consequence of the February 7, 1997 work related injury.<sup>9</sup> Therefore, the ALJ's decision to deny post-award medical benefits should be affirmed.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Post-Award Medical entered by Administrative Law Judge Jon L. Frobish on February 12, 2001, should be, and the same is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 2001.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Joseph Seiwert, Wichita, KS  
Jeff S. Bloskey, Overland Park, KS  
Jon L. Frobish, Administrative Law Judge

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<sup>7</sup> Drake v. State Dept. of Social Welfare-Larned State Hospital, 210 Kan. 197, 499 P.2d 532 (1972).

<sup>8</sup> Smith v. Allied Mutual Casualty Co., 184 Kan. 814, 818, 339 P.2d 19 (1959).

<sup>9</sup> See Frazier v. Mid-West Painting, Inc., 268 Kan. 353, 995 P.2d 855 (2000).

**WILLIAM BIRKNER**

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**DOCKET NO. 237,891**

Philip S. Harness, Director